No. ~~230~~ 5

Supreme Court of the United States

OCTOBER TERM 1952

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals (R. A. 78-90) is reported at 196 Fed. 2nd, 960. The findings of fact, conclusions of law and order of the Board (B. A. 22-75) are reported at 93 N. L. R. B. 1523.[1]

[1] For purposes of this Brief, the printed record before this Court consists of two separately paginated volumes: the Appendix to the Union's brief in the court below, herein designated "R. A.", and the Appendix to the Board's brief in the court below, designated "B. A." The proceedings in the court below are bound with and paginated continuously from the end of the Union's Appendix below.

Jurisdiction

The decree of the Court of Appeals (R. A. 90-93) was entered on May 22, 1952. The petition for a writ of certiorari was filed on July 28, 1952, and was granted October 20, 1952. The jurisdiction of this Court rests on Section 10(e) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), and 28 U. S. C. 1254.

Questions Presented

1. Where it is charged that a Union violated 8 (b) (2) of the Act in that it caused an employer to violate 8 (a) (3) of the Act, (a) Is it proper for the Board to omit the employer as a party and proceed solely against the Union?; (b) Assuming that this may be done, does Section 10 (c) of the Act permit the making of a back pay direction in the absence of a reinstatement direction?

2. Is a Union deprived of its right of free speech as guaranteed by Section 8 (c) when it is found guilty of violating Section 8 (b) (2) and 8 (b) (1) (A), for refusing to issue a "clearance" despite the fact that "no threat of reprisal or force or promise of benefit" is made?

3. May a finding that "discrimination" was practiced for the purpose of "encouraging membership" be predicated upon an assumption that "discriminatory conduct" constitutes "inherent" encouragement of membership?

4. Is the existence of a valid union security arrangement, actually practiced by the parties, unavailable as a defense unless evidenced by clear written language?

Statutes Involved

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) and the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are hereinbelow set forth.

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(b) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible

to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of ap-

peals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this

title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Statement

A. History of the Case.

This proceeding is founded upon a charge filed by Willard Christian Fowler against the Radio Officers' Union of the Commercial Telegraphers Union, A. F. L. (hereinafter designated the Union), alleging that it caused an employer, the Bull Steamship Company (hereinafter called the Company), discriminatorily to refuse him employment. The complaint, based upon said charge, issued only after the General Counsel to the Board had overruled the determination of the Board's Regional Director that no complaint should issue on the basis of the facts disclosed by his investigation of the charge (R. A. 2).

Following the usual proceedings under Section 10 (c) of the Act, the Board, Member Murdock dissenting *in toto* and Member Reynolds dissenting in part, issued its findings of fact, conclusions of law, and order on April 18, 1951 (B. A. 22-75) which adopted with modifications the findings and conclusions of the Trial Examiner finding the Union guilty of violations of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act (B. A. 22-37). By the Board's order, the Union was required to cease and desist from such unfair labor practices and affirmatively give notice that it withdraws objections to Fowler's employment by the Com-

pany and also to make Fowler whole for any loss he may have suffered by reason of the Union preventing his employment.[2] The Board's decision is reported in 93 N. L. R. B. 249.

By a divided Court, the Court below decreed enforcement of the Board's order. The majority opinion written by Judge Swan and concurred in by Judge Learned Hand, and the dissenting opinion of Judge Clark are appended to the record (R. A. 79-90).

B. The Facts of the Case.

As exclusive bargaining representative of the radio officers employed by 24 named steamship companies, including the Company, the Union and said companies executed a "standard" (B. A. 118, 213-214) collective bargaining agreement on January 11, 1947, covering the Company's radio officers. After the enactment of the Taft-Hartley Act, but prior to its effective date, the Union and the Company, on August 16, 1947, extended the term of the agreement until August 15, 1948.[3] The pertinent provisions of the collective bargaining agreement with respect to the employment of radio officers are set forth in the opinion of the Court below (R. A. 80-81).

It is undisputed that, in actual operation, the employment procedure which had been generally followed by the parties to the agreement prior to the extension of the term of the agreement, was that of a typical union hiring hall arrangement, *i. e.*, the Companies under contract with the Union requested the Union to furnish radio officers to fill vacancies as they occurred; to meet these requests, the Union's rules and by-laws provided for the maintenance

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[2] The Court below did leave open for determination in the compliance proceedings the question of the effect upon the back pay provision of Fowler's refusal to accept comparable work on other ships (R. A. 85).

[3] The validity of the contractual provisions theretofore in existence was thus preserved under Section 102 of the Act.

of a "shipping list" of its unemployed members arranged in the order of the termination of their last employment; when a request for a radio officer was received from a Company, the Union offered the assignment to those of its members who were seeking assignment, preference being given to the member longest unemployed; the member entitled thereto by the application of these rules was given "the necessary 'clearance'" (B. A. 45, R. A. 82). This method of filling jobs was so well understood and the practice so firmly established that it was only "very very infrequently" (B. A. 167, 192-194) that requests were received by the Union for any specific man. While the record sustains the Board's finding that "on some few occasions companies have asked that particular radio officers be assigned to them" (B. A. 46) the record shows that requests of that type occurred primarily during the war years when there was so great a shortage of men that there was no time lapse between availability for employment and ability to get a job so that the enforcement of the principle of rotation in issuing assignments to work was of only academic interest (R. A. 37).

Fowler, a ship's radio officer joined the Union on July 1, 1942, and was a member thereof in February and April of 1948 when the alleged unfair labor practices occurred. He had never had any difficulty in his relations with the Union (R. A. 16, 49).

The February Incident

On or about February 24, 1948, the S. S. FRANCES, one of the Company's ships, docked in the City of New York (B. A. 46). A member of the Union, Alexander Kozel, was the radio officer aboard, having been hired by the Company through the Union hiring hall at New Orleans, on December 29, 1947 (B. A. 46, 67). It appears that upon arrival of the vessel, Robert H. Frey, the Company's Radio Supervisor, had a conversation with Kozel and that on the

basis of this conversation, Kozel was led to believe that although his services were satisfactory, he was to be replaced by another radio officer (B. A. 46). Kozel objected to being discharged (R. A. 30). He called at the office of the Union and registered a complaint concerning his suspected discharge (B. A. 157, R. A. 35). After two or three visits to the Union in connection with his complaint concerning this unwarranted discharge,[4] Kozel appeared at the Union office on Friday, February 27th at about 3 o'clock, reported that his suspicions had been confirmed, and that a new radio officer, Fowler, had come aboard the vessel (R. A. 35). Thereupon, Fred M. Howe, General Secretary-Treasurer of the Union dispatched telegrams to both Fowler and Vice-President Kiggins of the Company (B. A. 85, 182, 212, 205, 173; R. A. 49). In these telegrams Howe advised Fowler that he was thereby suspended "on grounds that you neglected to obtain clearance for your present job and also for being a party to depriving another member of his job".[5] The Company was advised that Fowler was not in good standing "on grounds that forcing another member out of employment is strictly against Union by-laws" and "I again quote the provisions of our agreement requiring a clearance for all such job (*sic*)" (B. A. 48). Howe testified that shortly after these telegrams had been dispatched he received a call from Capt. Williams, Port Captain of the employer, requesting him to hold the matter in abeyance until he could investigate the matter (B. A. 51); that he also received a call from Fowler, who thereafter on

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[4] The contract clearly forbade the discharge of any radio officer whose services were satisfactory (R. A. 72, 81; B. A. 118).

[5] It was conceded that Fowler's conduct warranted suspension (R. A. 61). The Board held, however, that no suspension had been validly accomplished (B. A. 26-27). The cogent dissent by Board members Murdock and Reynolds and by Judge Clark below appear at B. A. 35, B. A. 27 note 9; R. A. 89. We refrain from discussing this question at length because of the transcendent importance of the other questions involved herein.

March 1st, visited him at his office and discussed the matter.

The testimony concerning these conversations makes it abundantly clear that (a) Fowler had gone aboard the S. S. FRANCES without any notification to the Union of his intention so to do, and without any "clearance" for the job (B. A. 114); (b) that Kozel, the incumbent radio officer registered complaints with the Union against his discharge (R. A. 30; B. A. 115); (c) that in the light of these facts, Howe, during the personal conversation, called Fowler to task for being a party to the "bumping" of a fellow member of the Union, whereupon Fowler disavowed any intent to ship without a Union clearance (B. A. 89), stated that he would not have had anything to do with the job had he known that it was filled (B. A. 120); that the entire incident had come about as the result of a "big misunderstanding" and that he wanted to "forget about it * * * go back to Miami, and let the whole matter drop" (B. A. 52-53, 92). Thereupon, the "suspension" was tacitly nullified and Mr. Howe urged Fowler to take a job aboard some other ship since he had come up from Miami, but Fowler preferred to go back to Miami (B. A. 92).

The testimony concerning the occurrences after this conversation is conflicting, Howe maintaining that he heard nothing further from Fowler and assumed that he had returned to Miami, in accordance with Fowler's admitted statement of his intention so to do (B. A. 52; R. A. 43), Fowler maintaining that he did communicate with Howe on Tuesday, March 2, before leaving for Miami (B. A. 53). As to this alleged latter conversation, testified to by Fowler, the Trial Examiner found that it comprised a "protest" predicated upon Fowler's mistaken belief that the new man assigned to the vessel, Miller, had a license which was only a month old, which fact, if true, would have entitled Fowler to priority under the Union's assignment rules (B. A. 53) (but see B. A. 53, note 5). At this

point it should be mentioned that because of the unpleasantness created by the entire incident, and his fear that his continuance aboard the S. S. FRANCES would not be pleasant, Kozel decided to relinquish the berth (B. A. 169), and the job was thereupon filled in the usual manner, Union-member Miller, as the member longest unemployed, receiving the assignment (B. A. 183).

Fowler testified that he returned to Miami on March 3rd (B. A. 93).

The April Incident

After Fowler's return to Miami, he forwarded a dues payment to the Union. This payment was acknowledged by a letter from Mr. Howe, dated March 25, 1948 (B. A. 94, 207). The reference in this letter to a change of companies was in accord with the personal conversation admittedly had between Fowler and Howe during the February incident, in the course of which Howe had discussed with Fowler the advantages of diversified experience (B. A. 20, 50-51). Fowler testified and the Board found that Fowler returned to New York and visited the Union Hall on April 24; that although he made no request for a job, Howe told him that plenty of jobs were available to him, but that he would not be given clearance for a Bull Line ship; that Fowler said he would return to the Union Hall; and that he thereafter appeared at the office of the Union on Monday morning, April 26, 1948 between 9 and 10 a. m. (B. A. 55; 98-99).

On that morning, certain job openings, including one aboard the S. S. RAPHAEL SEMMES, were announced in accordance with the regular practice and procedure of the Union. All of the members in the Union Hall at the time, including Fowler, bid for the job aboard the S. S. RAPHAEL SEMMES of the Waterman Steamship Lines (B. A. 55; 99) which was covered by the same "standard" agreement which applied to the Bull Steamship Co. Thereupon

Joseph Glynn then in charge of the Union office announced that Fowler, as the member longest out of work, was the successful bidder (B. A. 55; 99). Fowler thereupon requested and received a clearance to the S. S. RAPHAEL SEMMES (B. A. 55; 99), although he did so with a reservation that he was not sure he would take the ship (B. A. 55; 100). Thereupon he left the Union Hall and admittedly never thereafter returned to the Union Hall (R. A. 52; B. A. 107). Shortly after Fowler's departure, Frey called the respondent's office and spoke with Glynn (B. A. 191). He asked whether Fowler was at the respondent's office. He was told by Glynn that he had been there but had just left for a ship of the Waterman Steamship Lines. Glynn testified that that was the full substance of the conversation (B. A. 191). Frey, on the other hand, denied that Glynn informed him that Fowler had been there and left (which was the fact), and maintained that as part of the conversation he made known to Glynn that he wanted to get a clearance for Fowler on the Company's S. S. EVELYN (B. A. 200-201).

Meanwhile, armed with the clearance he had obtained at the Union Hall, Fowler visited the S. S. RAPHAEL SEMMES but decided not to take the berth. Later that afternoon, he phoned Howe, but mistakenly addressed him as "Mr. Frey", whereupon Howe asked what Fowler was doing at the Bull Line. Fowler replied that he had gone there to collect "some back pay", whereupon an argument ensued during which Howe accused Fowler of lying and of attempting to steal some more jobs from other members, while Fowler said "No, I was not. I just went by there to collect some back pay * * *" (B. A. 56; 102); that upon this unexpected turn of events, Fowler never did tell Howe that he had spoken with Frey and had received a job offer from him (B. A. 56), and did not ask Howe for any clearance (B. A. 131).

Fowler testified further that during the course of the argument Howe said to him "As far as I am concerned, you are through. Why don't you go over and join the A.C.A. (a rival union affiliated with the C.I.O.) (B. A. 103).

On the following day, April 27th, the Union was requested by the Bull Line to assign a man to its S. S. EVELYN, and this was done (B. A. 192). Fowler returned to Miami on April 28th and did not return to New York for over a year thereafter (B. A. 105).

C. The Board's findings.

The Board found that on or about February 28, 1948, and on or about April 26, 1948, Fowler was offered employment directly by the Company, subject to his ability to obtain "the necessary 'clearance' " from the Union; that the Union refused to issue the necessary clearance; that the Company refused to hire Fowler without the clearance; that Fowler was thus deprived of the proffered employment (B. A. 58, R. A. 84).

The Board found that the Union's refusal to issue the clearance to Fowler was motivated by its desire "to enforce against him as one of its members, the rules of fair dealing betwen its members it had prescribed for their mutual benefit" (B. A. 59). More specifically, that the Union refused clearance because (1) it wished to express its disapproval of the attempt to hire Fowler directly in circumvention of its hiring hall rules, and (2) because in the February incident, Fowler's hire by the Company would have caused the displacement of Kozel, another member of the Union, whose services had been admittedly satisfactory to the Company (B. A. 59).

Based on the foregoing facts, it has been found that the Union violated 8 (b) (2) and 8 (b) (1) (A) of the Act. The reasoning to support this finding runs thus: despite the rules of the Union and the practices of the parties to the contract, the *language* of the contract was such that it

obligated the Union to issue a clearance to any member in good standing regardless of any consideration other than "good standing" (R. A. 44-45); the Union's refusal to issue clearance caused the Company to discriminate against Fowler in a manner which was violative of Section 8 (a) (3); hence, the Union was guilty of violating 8 (b) (2). Further, that in refusing clearance, the Union was attempting to compel Fowler to conform to the hiring hall practice above described, thus "coercing and restraining" him in the exercise of his right "to refrain from concerted activities" as guaranteed in Section 7 of the Act, and that the Union thereby violated Section 8 (b) (1) (A) of the Act (B. A. 64-68; R. A. 84).

Specification of Errors To Be Urged

For the reasons set forth, *infra,* the Court below erred in granting enforcement of the Board's order.

Summary of Argument

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

A. The failure to join the employer as a party to the proceeding constituted fatal error.

Section 8 (a) (3) of the Act makes it unlawful for an employer

> "by discrimination in regard to * * * employment * * * to encourage or discourage * * * membership in any labor organization."

Section 8 (b) (2) makes it unlawful for a Union

> "to cause or attempt to cause an employer to discriminate * * * *in violation of Sub-Section 8 (a) (3).* * * *"*

In this case the employer refused to hire Fowler because of the Union's refusal to issue a "clearance." If and only if, the employer's refusal to hire Fowler under these circumstances was violative of Section 8 (a) (3), would the Union be guilty of violating Section 8 (b) (2). Hence, if the Union was guilty of an unfair labor practice under the facts of this case, the Company was equally guilty thereof; and the Board could not enforce the public rights involved without proceeding against both the employer and the Union.

B. In the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

Section 10 (c) of the Act empowers the Board to issue an order requiring

> "such affirmative action including *reinstatement* of employees *with or without* back pay, as will effectuate the policies of this Act: *Provided,* That *where an order directs reinstatement* of an employee back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

In the instant case, no reinstatement direction was made, the Board having rendered itself powerless to make such direction by the failure to join the employer. In the absence of such reinstatement direction the Board was without power to make a direction for the payment of back pay.

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act, and the Court below erred in ruling that International Brotherhood of Electrical Workers v. N. L. R. B., 341 U. S. 694, warranted such deprivation.

In holding that "no threats or promises to the Company were necessary", in reliance on the case of *International Brotherhood of Electrical Workers* v. *N. L. R. B.* (*supra*), the Court below improperly applied to this 8 (b) (2) case the rules which this Court enunciated in the above case, which dealt with an 8 (b) (4) (A) violation.

POINT III

There is no valid basis for the findings made in this case that the Union "caused" the Company "by discrimination * * * to encourage * * * membership".

A. The Union's conduct had neither the purpose nor the effect of "encouraging membership" within the meaning of the Act.

B. The Union was not guilty of "discrimination" within the meaning of the Act:

(1) In applying to Fowler, as a member of the Union, the same rules which governed all other members of the Union, the Union was guilty of no discrimination.

(2) The Union did not "restrain or coerce" Fowler in the exercise of his "right to refrain from concerted activities."

C. The Union's conduct did not constitute "cause."

POINT IV

The Court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract rather than the actual practices and interpretation thereof by the parties.

The majority of the Court below followed the majority of the Board in shutting its eyes to the actualities of the hiring practices of the parties as they existed when the contract was extended until August 1948. We shall show that it was error to apply to this case a rule of strict construction of language which was inappropriate to the case.

ARGUMENT

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

A. The failure to join the employer as a party to the proceeding constituted fatal error.

The finding that the Union in the instant case violated Section 8 (b) (2) is predicated on the finding that it caused the employer to engage in conduct which was violative of Section 8 (a) (3).[6]

It is thus apparent that if the Union was guilty of violating 8 (b) (2) the Company was equally guilty of vio-

[6] The contention that under the Board's interpretation of the Act as applied to this case, the employer's conduct was not violative of 8 (a) (3) under the rule enunciated in *Colgate Palmolive Peet Co.* v. *N. L. R. B.*, 338 U. S. 355, and that hence the Union was not guilty of violating 8 (b) (2) was overruled.

lating 8 (a) (3). *N. L. R. B.* v. *Herald Tribune,* 93 N. L. R. B. 419. Yet the complaint herein was directed solely against the Union. In the Court below, the Board did not deign to explain its failure to join the Company as a party to this case, but rather contented itself with maintaining that it had the discretionary power to select the respondent against which it would proceed. It relied for this discretionary power upon the cases of *Union Starch & Refining Company* v. *N. L. R. B.* (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815, and *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union* (C. A. 2), 192 F. (2nd) 654.

The Court below sustained the Board in this contention (R. A. 85).

In its Memorandum to this Court in opposition to our petition for the writ, the Board reversed its position on this score, and for the first time contended that since Fowler filed a charge against the Union alone and did not file a charge against the Company, that the Board was *without power* to join the Company as a party (p. 16, Memo for N. L. R. B. on petition for writ).

We urge that the Board's attempt to justify its failure to join the employer, whether predicated upon absolute discretion or lack of choice, must fail. If the joinder of the employer be discretionary, the failure to join it was so clear an abuse of discretion in the light of the established Board policy hereinbelow discussed, that the failure to do so was fatal. If the question be one of power, the short answer is that the Board was not required to proceed in a manner involving a clear abuse of its processes—processes which must always take into account the effectuation of the basic purposes of the Act.

In sustaining the Board's contention as to its discretionary power advanced in the Court below, the Court below failed to recognize the distinction between the cases cited in support thereof and the case *sub judice,* and thus

sanctioned conduct of the Board which constituted a clear departure from the established policy of joining employer and union as enunciated by the Board in the case of *N. L. R. B.* v. *Newman,* 85 N. L. R. B. 725 enforced (C. A. 2) 187 F. (2d) 488.

In the latter case the Board, explaining its rationale with respect to the joint liability of employer and union, pointed to the following controlling considerations:

(1) In the final analysis, it is the employer and not the Union that controls the hiring and discharge of his employees.

(2) Undesirable consequences would flow from the failure to join the employer:

(a) Employers would be willing to "buy peace" by acceding to union's demands, knowing that the Board would permit them to escape liability;

(b) Minority groups, knowing they could no longer rely on the employer's financial self-interest to protect their rights, would be inclined to resort to self-help;

(c) Cases against discordant employees would tend to increase, with the removal of the brake of the employer's self-interest.

(3) Analogously to tort law, "when the acts of two or more persons result in a legal wrong all the joint tort-feasors are jointly and severally responsible for the entire damages, without regard to which of them initiated the wrong, and even though one of them may have acted under duress." Cf. *N. L. R. B.* v. *National Broadcasting Co.* (C. A. 2), 150 F. (2) 895, 900.

The case of *Union Starch & Refining Co., supra,* did not detract from this rationale. In that case, the contention was advanced by the employer, who had been joined, that

the language of Section 10 (c) required that back pay must be assessed against *either* an employer or a union, *not both.* The Court held that the Board was vested with a a reviewable discretionary power to issue a back pay order against the employer or the union, *or* both.

In the case of *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union, supra,* the employer and the union were initially joined, but a settlement agreement was reached with the employer before the case had reached its final conclusion. Under these circumstances, the Court held that it was proper to continue the proceedings against the union alone.

But the distinction between the above cited cases and the instant case, is apparent.

The only case cited in apparent support of the Board's present contention that the Board is limited in its right to proceed to remedy an unfair labor practice solely to the person against whom a charge is filed is *Consumers Power Company* v. *N. L. R. B.,* 113 Fed. (2) 38, 42-43 (C. A. 6). We fail to find in this case, decided under the Wagner Act, any support for such contention. The restricted interpretation of its powers now advanced by the Board in reliance upon Section 10 (b) of the Act, would seem to overlook other countervailing provisions of the Act (Cf. Section 10 (a)). Its present position also departs from the long recognized view that "the role of the charge is merely to set in motion the machinery of an inquiry." Cf. *Union Starch & Refining Co.* v. *N. L. R. B., supra.* The acceptance of the Board's present position would have the effect of rendering nugatory the clear, pervading injunction of the Act that any and every action of the Board shall be designed to "effectuate the policies of the Act".

Assuming, however, that the powers of the Board are as limited as the Board now contends, it cannot be gainsaid that, as a practical matter, the Board could have refused

to proceed unless the charging party leveled his charge against the employer as well as the Union. Only so could it enforce the public right involved and abide by the injunction contained in the Act that its conduct must be designed to effectuate the policies of the Act. *National Licorce Co.* v. *Labor Board,* 309 U. S. 350. To permit a charging party to apprise the Board of facts which appear to add up to an unfair labor practice simultaneously committed by two parties, and to permit such charging party to dictate to the Board that only one of these two shall be made to answer therefor—and this, in the face of clear Board policy as enunciated in *H. M. Newman, supra,* results in a situation which is repugnant to the entire spirit of the Act and which transforms the Board into an instrumentality for the vindication of private rather than public rights. *Amalgamated Workers* v. *Edison Co.,* 309 U. S. 261. As this Court said in *N.L.R.B.* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9:

> "It is not required by the statute to move on every charge. * * * It may decline to be imposed upon or to submit its process to abuse."

Whether predicated upon "discretion" or upon "lack of power" the approval by this Court of the Board's omission of the employer, would open wide the door to arbitrary action. The discretion which has been held to be a reviewable discretion (*Union Starch & Refining Company, supra*), would become an absolute discretion.

The possible evil consequences, including those of collusive injury and of arbitrary favoritism, inherent in the approval of this practice under the circumstances here involved are readily foreseeable. This is not to say that cases may not arise where it will be proper to proceed against a union alone. Thus, where a union *attempts* to cause discrimination but the attempt proves unsuccessful because of employer resistance, obviously it would be

proper to proceed against the union alone, for 8 (b) (2) would be violated though 8 (a) (3) would not. So too, where an employer acknowledges his guilt and agrees to remedy his discriminatory practices, patently it would be proper to proceed against the union alone. These are rules dictated by necessity and by reason and involve no frustration of the policies of the Act; but the action of the Board in omitting the employer in the instant case was dictated by no such valid consideration, and clearly does involve a frustration of those policies.

If the Board's action in this case be approved, what becomes of the cogent considerations pointed out in the *Newman* case? The only answer which the Board has given to this question is that

> "the *Newman* case is wholly inapposite, for there both the union and the employer responsible for the discrimination against an employee were before the Board as the parties respondent. The only question of policy presented in that case was whether, in such circumstances, both parties respondent should be held jointly and severally liable to make the employee whole." (Page 18 Memo of N.L.R.B. on petition for the writ.)

If then it is the Board's policy to find both employer and union jointly and severally liable when they *are* both parties to a proceeding, how justify the failure to *make* them both parties to the proceeding?

Had the employer herein been joined, the effectuation of the policies of the Act clearly would have required that a finding be made against the employer no less than against the Union. Can the Board escape its duty by the simple expedient of omitting the employer at the outset and then pleading its inability to discharge its public duty?

B. In the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

As one consequence of the failure to join the employer herein, the decree in the instant case clearly contravenes Section 10 (c) in that it contains a back pay provision although no reinstatement direction is contained therein. We urge that, assuming that the Board was empowered to omit the employer as a party, thus precluding itself from the making of a reinstatement direction, it could not decree the payment of back pay against the Union. The language of Section 10 (c) makes it clear that back pay is an incident of reinstatement. Thus, it is "* * * reinstatement of employees with or without back pay * * *" which may be ordered; and under the proviso of Section 10 (c), payment of back pay may be required of a union or employer, as the case may be "* * * *where an order directs reinstatement of an employee* * * *.*" (Emphasis supplied.)

The Wagner Act contained no proviso comparable to that now set forth in unmistakable language in Section 10 (c) of the Act. The language there set forth is clear and unequivocal, viz.: "*Provided,* That where an order directs reinstatement of an employee back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him." The Board's arguments in opposition to our contention on this point can be accepted only at the price of repealing the phrase "*where an order directs reinstatement*". The purposefulness of Congress's intent, in inserting that phrase, with full knowledge of the decisions rendered under the Wagner Act, is emphasized by the fact that it is contained in a proviso which follows the preceding general language of Section 10 (c). Had Congress intended to empower the Board to order back pay even

where no reinstatement direction was made, it could have readily omitted "where an order directs reinstatement"; but it is beyond the power of the Board to repeal that phrase.

In *Progressive Mine Workers* v. *N.L.R.B.*, 187 Fed. (2) 298 (C. A. 7), 27 L. R. R. M. 2334, the Court correctly pointed out that:

> "Sec. 10 (c) contains the Board's *sole authority* for directing backpay." (Emphasis supplied.)

Cases which hold that reinstatement may be ordered without a direction for back pay furnish no authority for the converse situation of a back pay order without a reinstatement direction, for the Act clearly vests the Board with the power to direct reinstatement *with or without back pay.*

The lack of judicial sanction for the type of order made herein has been recognized by the Board (Sixteenth Annual Report of the National Labor Relations Board, pp. 243, 244).

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 694, warranted such deprivation.

The Union maintained that its refusals to issue clearance constituted an expression of its views against the improper discharge of a satisfactory radio officer and against the circumvention of rules designed to accomplish a fair and equitable distribution of work; and that the expression of such views, unaccompanied by any "threat of reprisal or force or promise of benefit" was protected by the provisions of Section 8 (c) of the Act.

The Court below held:

> "No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 2 Cir. 181 Fed. 2nd 34, 38, aff'd 341 U. S. 694" (R. A. 84-85).

In so holding, the Court below applied to this 8 (b) (2) case the rule which this Court enunciated in an 8 (b) (4) (A) case. A reading of *International Brotherhood of Electrical Workers* v. *N. L. R. B., supra,* clearly shows that the decision of this Court in that 8 (b) (4) (A) case is not controlling in an 8 (b) (1) or 8 (b) (2) case. We need go no further to indicate the error of the Court below than to quote from the opinion of this Court, *viz.*:

> "The intended breadth of the words 'induce or encourage' in Section 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of Section 8 (b). For example, the unfair labor practice described in 8 (b) (1) is one to 'restrain or coerce' employees; in 8 (b) (2) it is to 'cause or attempt to cause an employer' * * * The scope of 'induce' and especially of 'encourage' goes beyond each of them. * * *"
>
> "The remedial function of 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in 8 (b) (4). The general terms of 8 (c) appropriately give way to the specific provisions of 8 (b) (4)."

If the decision of this Court in the above case should now be extended indiscriminately to cases arising under 8 (b) (2) and 8 (b) (1), as the Court below has done, the protection of free speech guaranteed by 8 (c) will have been destroyed.

The Board implies that since the Union's refusal to issue clearance resulted in Fowler's inability to get the job, that this refusal constituted something more than an "expression of views, arguments or opinions." In this connection, the facts of the case must be borne in mind. While the Union refused to issue clearance, the clearance being a written form assigning a radio officer to a specific job (R. A. 75-77), because it refused to be a party to the circumvention of its hiring hall rules and to the wrongful discharge of Kozel, the record is clear that no "threat of reprisal or force or promise of benefit" was made. Thus the ruling in this case says in effect that the Union was forbidden to state that it refused to be a party to the violation of its rules—was forbidden to state that it refused to write an endorsement of Fowler's attempt to displace another member. Further it says that the failure of the Union to issue clearance in and of itself is "restraint and coercion" even if the Union did nothing further and intended to do nothing further to interfere with the taking of a job. This holding goes far beyond anything which Congress intended to proscribe when it banned the use of "restraint or coercion." This Court will recall that as originally drafted the Act proscribed not only "restraint or coercion" but also "interference with" an employee's rights. As finally enacted, the words "interference with" were omitted for the specific purpose of assuring the fact that "interference" as distinguished from "restraint or coercion" was not made a Union unfair labor practice (*Cf.* Conference Report, House Report 510, 80th Congress pp. 42, 43).

Thus, even if the Union's refusal to issue clearance "interfered" with Fowler obtaining the job, it did not constitute "restraint or coercion". If the protection of the right to express "views, arguments or opinions" is to have any meaning, then under the facts of this case, the Union, abjuring any violence or threat was certainly free to say: "We refuse to issue a clearance which does violence to our rules and which would make us a party to the deprivation

of the clear rights of one of our members (Kozel)". Under the facts of this case how else could the Union have expressed its views?

POINT III

There was no valid basis for the finding made in this case that the Union "cause(d)" the Company "by discrimination" * * * "to encourage * * * membership".

A. The Union's conduct had neither the purpose nor the effect of "encouraging membership" within the meaning of the Act.

The Union contended that in refusing clearance, it was not motivated by any purpose to "encourage membership" —another neessary ingredient of the offense charged--and further that its conduct did not have the effect of encouraging membership.

As to this, the Court below held that "whether the Union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers, such as Kozel, is immaterial[7] * * *" and that its conduct in refusing clearance "displayed to all *non-members* the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85). (Italics supplied.)

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[7] In so ruling, the Court below also committed the error of eliminating the question of motive from consideration. The Union's dilemma, created by the fact that the issuance of clearance to Fowler would have implied consent to the discharge of Kozel—a discharge expressly forbidden by the contract (R. A. 81)—was deemed immaterial. Yet it is now settled beyond peradventure that motivation must be considered. It is not every discrimination which the Act proscribes. The discrimination must be practiced "to encourage or discourage membership". Thus an employer may discharge for any reason or no reason so long as he is not motivated by the desire to "encourage or discourage membership".

The theory upon which the Court below thus relied—that of "indirect" or "inherent" encouragement by the effect of the Union's action upon non-members—has been repudiated.

Thus the 8th Circuit in *N. L. R. B.* v. *International Brotherhood of Teamsters,* 196 F. (2), rehearing denied June 2, 1952, said:

> "The testimony of Boston, however, shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union. The question then is, Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by 'suspicion' and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it".

So too, in the case of *N. L. R. B.* v. *Reliable Newspaper Delivery Inc.* (3rd Cir.) 187 F. (2) 547, the Court said:

> "Even if we should assume * * * 'discrimination' then under the statutory language, we must go further and ascertain whether the discrimination 'encouraged membership' * * *.
>
> "Generally speaking, the proposition that in order to establish an 8 (a) (3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support."

So too, in the case of *N. L. R. B.* v. *Webb Construction Company* (8th Cir.), 196 F. 2nd 702, 30 L. R. R. M. 2125, decided May 8, 1952, the Court said:

> "There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging mem-

bership in a labor organization. *N. L. R. B.* v. *Winona Textile Mills* (8th Circuit), 160 F. (2) 201; *N. L. R. B.* v. *Potlatch Forests* (9th Cir.), 189 F. (2) 82; *Western Cartridge Co.* v. *N. L. R. B.* (7th Cir.), 139 F. (2) 855 * * *.

"* * * Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.

"We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act."

We urge that the decision of the Court below is in direct conflict with the above cited decisions of the Third, Seventh, Eighth and Ninth Circuits. Indeed, the Court below has just recognized this difference of opinion at least insofar as the Third Circuit is concerned. In a decision rendered by the Court below on June 24, 1952, in N. L. R. B. v. Gaynor News, Inc. (not yet officially reported), the Court below said:

"True the Third Circuit in the Reliable case (Reliable Newspaper Delivery, Inc., supra) went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. * * * Our own view comes to this: Discriminatory conduct, such as that practiced here, is *inherently conducive* to increased union membership * * *. To this extent *we find ourselves in disagreement with the Reliable case.* * * *" (Emphasis supplied.)

It, therefore, becomes necessary for this Court to resolve the differences in the views respectively held by the above Circuits.

The Board urges that "membership (in any labor organization)" in the context of Section 8 (a) (3) embraces the privileges and duties incidental to Union membership including the faithful performance of obligations imposed by a Union upon its members as such, and not merely the formal act of joining or remaining in a Union; and that since the Union's conduct in this case was aimed at compelling obedience to Union rules, the Union's conduct encouraged membership in the sense that it encouraged compliance with membership rules.

Under this view, the Board contends it is immaterial that Fowler was an old Union member and was not, therefore, "encouraged" to *join* the Union. If this Board concept of "membership" be adopted, where do we stop?

We do not consider it necessary to labor the point that when Congress spoke of "encouraging or discouraging membership" it intended to deal with encouragement or discouragement in the well known and commonly accepted sense. It intended to prohibit Unions from improperly encouraging individuals to join their ranks and to prohibit employers from improperly discouraging employees from joining unassisted Unions. It certainly did not intend that when an individual voluntarily elected to join a Union and to be bound by its rules of membership, that the Union was to be restrained from asking that such a member abide by the rules which he had voluntarily elected to honor.

Indeed, Congress clearly indicated a contrary intent when it said in the proviso to Section 8 (b) (1)

> "that this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

In apparent recognition of the weakness of its position on this score, the Board and the Court below found it necessary to resort to the effect of the Union's conduct on non-members (R. A. 85). But this argument, aside from its tenuousness, overlooks the question of the propriety of a Union urging, even insisting upon, compliance with its rules by those who elect to be members even if some metaphysical encouragement of membership is engendered thereby. A Union which makes a contribution to a charitable cause with no ulterior motive may thereby encourage some individual to join its ranks. Did Congress intend to proscribe encouragement of Union membership by such means?

The observations of the 8th Circuit in *N. L. R. B.* v. *Webb Construction Company, supra,* forcefully apply to the facts in this case. Here Fowler had voluntarily assumed the obligations and taken the advantages of membership in the Union. As we shall shortly demonstrate the Union's insistence upon his compliance with the rules by which he had obligated himself to abide, did not constitute "discrimination" within the meaning of the Act. Certainly, such insistence cannot be said to have been motivated by a desire to "encourage membership".

B. The Union was not guilty of "discrimination" within the meaning of the Act in applying to Fowler, as a member of the Union, the same rules which governed all other members of the Union, and the Union did not "restrain or coerce" Fowler in the exercise of his "right to refrain from concerted activities".

The Union rules governing the distribution of work amongst its members have been described *supra.* No question as to the fairness or moral propriety of these rules has been raised. *Per contra* the Trial Examiner found that they were practiced in order to enforce "rules of fair dealing between its members for their mutual benefit". These must, therefore, be distinguished from union rules

of the "indefensible" variety. *Cf. N. L. R. B.* v. *Elk Lumber Co.*, 91 N. L. R. B. 333.

In the instant case, the denial of clearance was motivated by the twofold purpose of (1) enforcing these rules of fair dealing and, (2) in the February incident, of protesting the wrongful discharge of Kozel, the incumbent Union member, whose services had been satisfactory to the company, and who desired to retain his post.

There is not a word in the record to even indicate that the Union's refusal of clearance was motivated by any activities of Fowler in support of any rival union or in opposition to the union as such, or on any personal ground. Fowler was not *persona non grata* for any reason connected with union or non-union activity during the occurrence of the incidents here involved. The Union's refusal to issue clearance took place not because of Fowler's union activities but rather in spite of them. Had the Union, by its conduct, sanctioned the wrongful discharge of Kozel it would have "discriminated" against Kozel. Had the Union issued clearance to Fowler when another member was entitled thereto it would have favored Fowler only at the price of discriminating against another. Had the union sanctioned conduct of Fowler which would destroy the method of orderly work distribution by which he and all other members of the Union had agreed to abide, it would have been guilty of discrimination against every other member of the Union who did not seek to evade its rules. Yet the Court below held the existence of this intolerable dilemma to be immaterial. We urge that in so holding, the Court below brushed aside the basic test which has always been applied to ascertain whether "discrimination" exists:—"What was the true reason back of the discharge"? *Victor Manufacturing and Gasket Co.* v. *N. L. R. B.*, 175 F. (2) 867 (C. A. 7).

Further, the Act provides that employees shall have the right "to engage" in concerted activities and shall also

have the right "to refrain" from any or all of such activities "except to the extent that such right may be affected by an agreement requiring membership * * *."

Preliminarily, we point out that Fowler's "right to refrain" was "affected" by the agreement—*e. g.* the provision that nothing contained therein should justify the discharge of a satisfactory radio officer. But more importantly the Act confers the right "to engage" *or* "to refrain". Now, the activity involved in the instant case dealt with the operation of the hiring hall. It is clear from the findings of the Trial Examiner and the Board that the right "to refrain" which the Board was seeking to protect had to do with the procurement of work through the medium of the Union hiring hall and the rules adopted with respect to the operation thereof.[8] In short, the Trial Examiner and the Board said that Fowler was free to seek employment directly from the Company without reference to the Union hiring hall.

Hence, applied to this case, the purpose and intent of Section 7 of the Act clearly was to permit Fowler to participate in the operation of the hiring hall if he so desired, or to have nothing to do with that form of concerted activity, if he so desired.

The facts of the case disclosed clearly that Fowler did not choose to divorce himself from participation in the hiring hall. On the contrary, all of his actions indicated a desire to "engage" in this activity. Thus, he insisted that during the February incident "I had no idea of signing articles without obtaining a 'clearance' from the Union" (B. A. 89); his "protest" of Miller's assignment

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[8] Here again the Court below was in error in stating that "the concerted activity in the case at bar was the refusal to take employment with the Company as a means of reprisal against it for discharging KOZEL" (R. A. 84). This conclusion of the Court below as to the concerted activity involved herein is at complete variance with the reasoning of the Board on this subject (B. A. 59, 60).

was predicated upon the ground (albeit mistaken) that he had a prior right under the Union's assignment rules (B. A. 53, R. A. 28); and in the April incident, he bid for the job aboard the S. S. Raphael Semmes in accordance with the Union rules and was actually awarded the clearance for that job based upon the fact that, as the member longest unemployed, interested in the assignment, he was entitled to the clearance (B. A. 99).

Hence, it appears upon analysis that the Union has been found guilty of depriving Fowler of his right "to refrain" when, in fact, he elected "to engage" albeit upon his own terms.

Fowler was free to have nothing to do with the hiring hall, but he chose to utilize its facilities. Indeed, by the use of these facilities, he admittedly received and accepted an assignment in preference to other members. Despite this, it has been found that he was free to take the advantages of "engaging" while at the same time insisting upon the advantages of "refraining".

Thus, the ruling of the Board and the Court below says, not merely that you may play baseball or not, as you may choose, but that if you do elect to play, you may, at any stage of the game, insist on ten strikes while all other players are limited to three. The Board has heretofore held such an interpretation of the "right to engage • • • or to refrain" repugnant to the intent of the Act. In analyzing this problem, in an analogous case of alleged employer unfair labor conduct, the Board in *Elk Lumber Company, supra,* quoted the following language from a decision of the U. S. Court of Appeals for the Eighth Circuit:

> "While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid them, and at the same time select

what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." * * *

The Board's Opinion said further:

"Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, both the Board and the courts have recognized that *not every form of activity that falls within the letter of this provision is protected.* The test, as laid down by the Board in the *Harnischfeger Corporation* case, and referred to with apparent approval by the Supreme Court in the recent *Wisconsin* case, is whether the particular activity involved is so 'indefensible' as to warrant the employer in discharging the participating employees. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.

"Here, the objective of the carloaders' concerted activity—to induce the Respondent [company] to increase their hourly rate of pay or to return to the piecework rate—was a lawful one. To achieve this objective, however, they adopted the plan of decreasing their production to the amount they considered adequate for the pay they were then receiving. In effect, this constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms. The courts, in somewhat similar situations, have held that such conduct is justifiable cause for discharge. Thus, in the *Conn* case, the Court of Appeals for the Seventh Circuit found that the employer was justified in discharging employees who refused to work overtime, saying:

'We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.'

And in the *Montgomery Ward* case, in which employees at one of the employer's plants refused to process orders from another plant where a strike was in progress, the Court of Appeals for the Eighth Circuit said:

'It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. * * * Any employee may, of course, be lawfully discharged for disobedience of the employer's directions in breach of his contract. * * * While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work'."

By the same token here, Fowler was free to resign from the Union or to have nothing to do with the Union's hiring hall, but he was no more free to remain a member of the Union and utilize the facilities of the Union's hiring hall upon his own terms than the employees in the above case were free to prescribe the conditions of the jobs which they elected to retain.

Further, the Union's insistence on Fowler's honoring his membership obligations did not constitute "cause" of "discrimination" to "encourage membership". The last proviso of Section 8 (a) (3) of the Act, states: "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable ground for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Here the Union made it clear that its refusal to issue clearance was predicated "on grounds that forcing another member out of employment is strictly against Union By-laws" (B. A. 182, 212). The Union never at any time claimed that Fowler was not in good standing for failure to pay or tender his dues or initiation fees.

POINT IV

The court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract rather than the interpretation thereof by the parties and their actual practices thereunder.

It was undisputed that if a valid hiring hall arrangement was in existence at the times here pertinent the Union's actions were justified and protected by the Act (Sec. 102).

Both the majority of the Board and the majority of the Court below held that the actual practices of the parties was of no moment because of the conclusions reached by them that

a) The contract clearly and unambiguously negatived the hiring hall arrangement;

b) Even if the contract be deemed ambiguous, in the absence of a clearly expressed hiring hall arrangement, such arrangement would be unavailable as a defense.

In appraising the validity of these conclusions it is of interest to trace the path by which they were reached.

The Trial Examiner restricted the Union in its proof as to the parties' understanding of the contract and their practices thereunder upon the ground that the contract was clear and unambiguous on its face (R. A. 44-45). The Board followed the Trial Examiner in likewise holding that the contract was clear and unambiguous on its face and that the Trial Examiner had, therefore, properly excluded evidence relating to the parties' interpretation of its provisions and to their hiring practices during the period of its existence (B. A. 25). Oddly enough, however,

the Trial Examiner and the Board differed as between themselves as to the meaning of the language which each had found to be clear and unambiguous (B. A. 24 Note 3-25; B. A. 63). The Court below in turn could "find in the record no exclusion of proffered evidence which would have added anything material to the Trial Examiner's findings as to the practices of the parties". (R. A. 83). As a matter of fact the record clearly shows that the Union was restricted in its proof as to the meaning of the word "clearance" which is contained in quotation marks in the contract itself (R. A. 44-46). As a result of the foregoing, the quoted word "clearance" has been subjected to all shades of definition. The Union contended that "clearance" connoted a work assignment issued by the application of the method of selection on a rotating basis as described *supra,* pages 9-10; and that, as shown by Respondent's Exhibits 5, 6, 7, and 8 (R. A. 75-78), a clearance was an assignment of a specific man to a specific ship, acceptance of the assignment being signified by the signature of the recipient of the assignment. The Trial Examiner held in effect that the issuance of a "clearance" was no more than a ministerial act which the Union was required to perform provided only that the requirement of a "membership in good standing" was met (B. A. 63). The Board, in turn, held that the issuance of a "clearance" was intended as a certification by the Union of the good membership status of any employee (B. A. 24). The Court below defined "clearance" as meaning "a written statement of good standing in the Union" (R. A. 79). The Solicitor General in his memorandum on our petition for a writ of certiorari, forced more closely to the inescapable actualities of the situation, defined "clearance" as "a referral from the dispatcher at the Union Hiring Hall" (p. 7, Memorandum for N.L.R.B.).

In their dissents, Board Member Murdock and Judge Clark below held that because of the exclusion of evidence

as to the meaning of "clearance" the precise effect of the contract's hiring provisions could not be determined (R. A. 88); but on the basis of the clear evidence exhuded by the record as to the practices of the parties, they reached the conclusion that a hiring hall arrangement existed.

Need we say more to establish the error of the conclusion that the contract was clear and unambiguous on its face?

We turn then to the next question, namely:—the necessity for a clearly expressed written hiring hall arrangement in order that the hiring hall practice be available as a defense. As to this, the Board contended and the Court below held that, even if the contract be deemed ambiguous, since Union security arrangements, such as the hiring hall, are valid only by virtue of the Union shop proviso to Section 8 (a) (3)[9] the contract cannot come within the statutory exception since its purpose is not expressed in plain and unmistakable terms.

The Union agreed that it was necessary for *the proof* to clearly show the existence of the hiring hall arrangement. The Board contended that this was not enough—and that it was necessary for *the language of the contract* to clearly and unmistakably establish such an arrangement.

In thus advocating a test which exalts form over substance the Board relied on the cases of *N.L.R.B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695; *N.L.R.B.* v. *Don Juan, Inc.* (C. A. 2), 178 Fed. (2nd) 625, 627; and *N.L.R.B.* v. *Mason Manufacturing Co.* (C. A. 9), 126 F. (2nd) 810, 813.

We urge that in adopting the Board's contention on this score, the Court below misread the teachings of these cases.

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[9] In this case, because of the provisions of Section 102, the closed shop proviso to Section 8 (3) of the Wagner Act is applicable.

Carefully read, it is apparent that these cases stand for the proposition that where a union security provision is invoked as a defense to conduct which would be otherwise discriminatory, there must be "a sufficient showing" of the existence of such a valid union security arrangement; but these cases do not hold that when such a valid security arrangement exists in fact it must be disregarded for defects in form. Indeed, in *N.L.R.B.* v. *Electric Vacuum Cleaner Co., Inc.* (*supra*), the Board found that a written contract was modified by an *oral* provision pertaining to a closed shop. This Court did not disturb that finding but rather rested its decision on the fact that the Union there involved was an "assisted" one.

So, too, in the cases of *N.L.R.B.* v. *Don Juan, Inc.* (*supra*), and *N.L.R.B.* v. *Mason Manufacturing Co.* (*supra*), the Court said that there must be a "sufficient showing" that there was a contract for a closed shop.

It is apparent from a reading of all of these decisions that the requirement of "a sufficient showing" was designed to prevent "discrimination" sought to be accomplished on the basis of a pretext or an afterthought, or by a union which did not qualify as one entitled to enforce such union security provisions. But those considerations have no application here; for in the instant case there was "a sufficient showing" that, in fact, a lawful hiring hall arrangement existed.

The error of which the Board and the Court below were guilty in this case was pointed out in the case of *N.L.R.B.* v. *Scientific Nutrition Company* (C. A. 9), 180 F. (2nd) 447, where the Court said:

> "We are persuaded that this concentration on the terms of the writing led the Board to overlook or disregard material and uncontroverted evidence tending to show that Capolino and Local 22832 had long

understood and *administered* their contract as requiring membership in the local as a condition of employment." (Italics supplied.)

The contention that strict construction of verbiage is required even where such strict construction is unnecessary to avoid discrimination based on a pretext or afterthought, is all the more surprising when viewed in the light of other recent decisions of the Board which have disregarded form in favor of substance.

Thus in the case of *Boilermakers AFL* (*Consolidated Western Steel Corporation*), 94 N.L.R.B. 1590, the Board said: "On its *face* the hiring clause appears to be *lawful*" • • • yet "This hiring *procedure*, involving preference in hiring to union members, is *unlawful*." (Italics supplied.)

Indeed, ironically, the Board has recently held that a *clearly expressed unlawful closed shop provision* was not violative of 8 (a) (3) and 8 (b) (2) because of "the absence of an *intention* to enforce it." *Port Chester Electrical Construction Corp.*, 97 N.L.R.B. No. 59.

Fairly read, the record in the instant case leaves no doubt that a lawful hiring hall arrangement existed in fact and that its practice by the parties was unquestionably *ante litem motam*. The administration of such a hiring hall arrangement was lawful under the Wagner Act, and the lawful continuation thereof for a period of one year was expressly authorized by Section 102 of the Act.

Under these circumstances, the use of a rule of strict construction, adopted by our courts to prevent injustice, should not be invoked to produce injustice.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be reversed and enforcement of the Board's order should be denied.

Respectfully submitted,

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